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October Term, 1926.

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GEO. O. RICHARDSON MACHINERY COMPANY, A CORPORATION, Petitioner,

vs.

MRS. ANNIE SCOTT, ADMINISTRATRIX OF THE ESTATE OF JOHN A. SCOTT, DECEASED, Respondent.

[redacted]

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

[redacted]

BRIEF OF PETITIONER.

[redacted]

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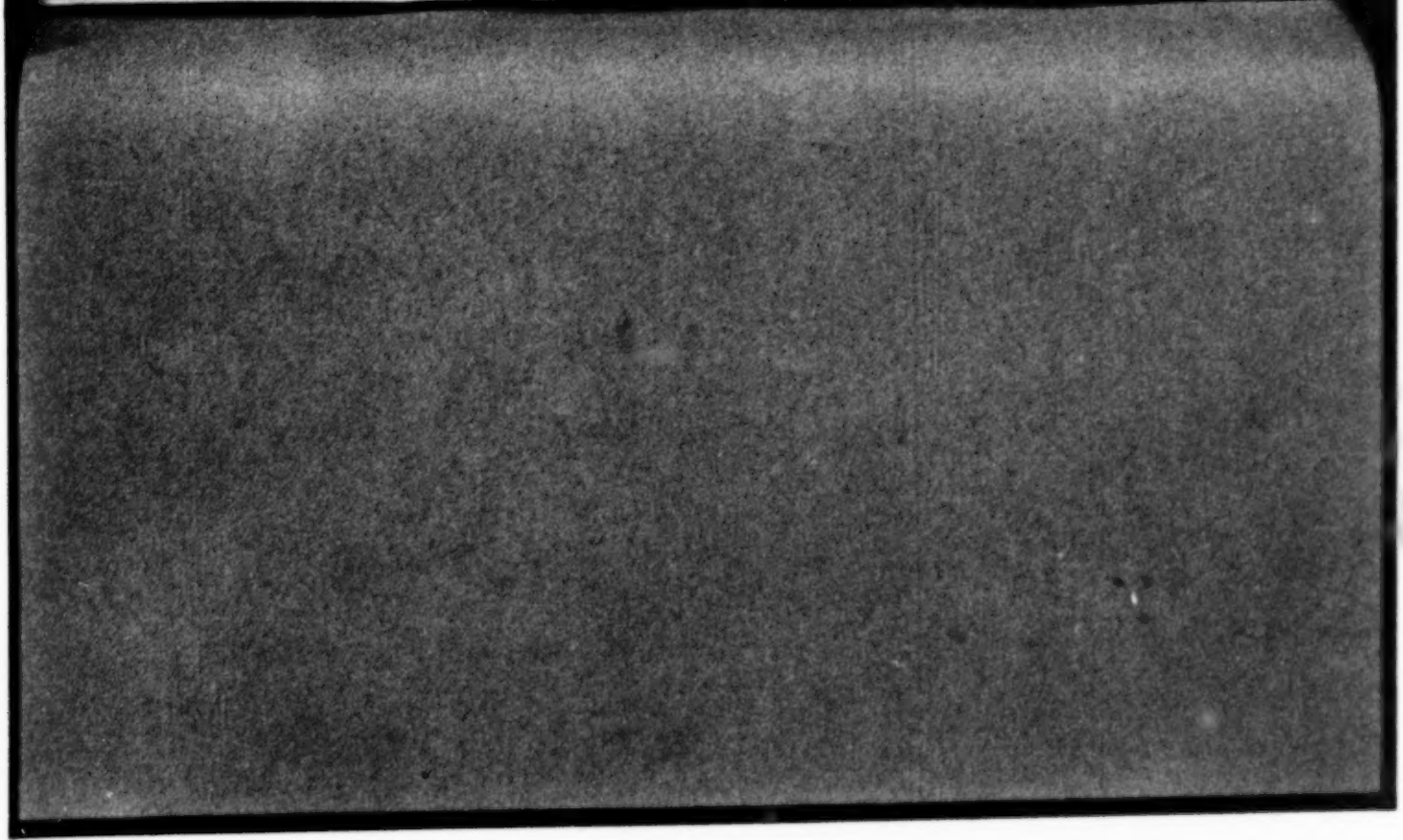

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THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926

No. 988

EO. O. RICHARDSON MACHINERY COMPANY, A CORPORATION, *Petitioner,*

vs.

RS. ANNIE SCOTT, ADMINISTRATRIX OF THE ESTATE OF JOHN A. SCOTT, DECEASED, *Respondent.*

N PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

BRIEF *of* PETITIONER.

Petitioner, a corporation of Missouri, was sued in the urts of Oklahoma. Summons was served and service tained only on the Secretary of State. The Oklahoma nstructive service statutes, sections 5436 and 5442, Comled Oklahoma Statutes 1921, are as follows:

"5436. *Process served on Secretary of State, when.* In all cases where a cause of action shall accrue to a resident or citizen of the State of Oklahoma, by reason

of any contract with a foreign corporation doing business in this state, or where any liability on the part of such foreign corporation shall accrue in favor of any citizen or resident of this state, whether in tort or otherwise, and such foreign corporation has not designated an agent in this state upon whom process may be served or has not an officer continuously residing in this state, upon whom summons or other process may be served so as to authorize a personal judgment, service of summons or other process may be had upon the Secretary of State, and such service shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject-matter, whether sitting in the county where the Secretary of State is served or elsewhere in the state."

"5442. *Corporation's non-compliance with law—venue—process.* Any foreign corporation, doing business in the State of Oklahoma, having failed either to appoint an agent upon whom service of summons or other process may be had, or failed to file in the office of the Secretary of State a duly authenticated copy of its articles of incorporation or character (charter), or having failed to pay the license fee as required by law, then in the event of such foreign corporation having failed to comply with any of the provisions of the law as above referred to, any persons now or hereafter having any cause of action against any foreign corporation may file suit against said foreign corporation in any county in the state and service of summons or any process upon the Secretary of State shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject-matter."

The petitioner had no notice of the suit. It is within the class of corporations which the above quoted sections

specify as suitable objects for the class of service there provided.

After the judgment was rendered, and after a motion to quash service of summons had been overruled, the petitioner filed a petition to vacate the judgment (Tr., p. 29), principally upon the ground that no notice was given, nor process served, and that its constitutional rights were violated.

The statute provides that such proceeding shall be in the form of a petition, and summons shall issue thereon (section 812, C. O. S. 1921), and it has been held by the Supreme Court of Oklahoma that such a petition is in the nature of an equitable proceeding to set aside or vacate a judgment.

—*Schulte* v. *Commissioners*, 250 Pac. 123, . . . Okl. . . .
McIntosh v. *Holtgrave*, 191 Pac. 739, 79 Okl. 63.

The trial court sustained a demurrer to this petition, and the Supreme Court of Oklahoma, in sustaining the trial court, said:

> "For reversal, it is first urged that the trial court had no jurisdiction to render the original judgment in said cause for the reason that section 5442, *supra*, under which service of summons was had on the Secretary of State, is in violation of Sec. 7, Art. 2, of the Constitution of Oklahoma, and the Fourteenth Amendment to the Constitution of the United States.
>
> "Counsel advance many arguments as to why said section should be held unconstitutional, but we are bound by the opinion in *Title Guaranty & Surety Co. v. Slinker*, 42 Okl. 811, 143 Pac. 41, wherein this court held that said section does not violate the provisions

of the state or federal constitutions guaranteeing to such foreign corporation due process of law and does not deny it the equal protection of the law."

* * * * * * * *

"Said section nowhere requires the Secretary of State to notify the defendant of such proceedings. Plaintiff in error insists that it is the implied duty of the Secretary of State so to do. * * * We cannot read such a provision into the statute." (Tr., p. 226.)

The State Supreme Court, having held squarely that these sections of the State Statutes (the validity of which we had "drawn in question") do not violate the Fourteenth Amendment to the Constitution of the United States, this court has jurisdiction to review by *certiorari*. (Sec. 237, Judicial Code, as amended by Act of February 13, 1925.)

The first opinion of the Oklahoma Supreme Court (Tr., p. 216), eliminated the constitutional question, holding that when summons was served upon the Secretary of State he must give notice to the foreign corporation sued. Since the Secretary had not performed this duty, that opinion reversed the trial court.

Under this construction of the service statutes, the constitutional question does not appear. Had the Secretary of State given us notice of the suit, the Richardson Machinery Company would have had an opportunity to appear in court and present its defense, and this proceeding would not now be in this court for consideration.

But the Secretary did not give us notice. We had no knowledge of the pendency of the litigation; and, in order

that the Supreme Court of Oklahoma might write its second opinion, it was necessary for them to determine and they did determine:

1. That the sections providing for this service (sections 5436 and 5442, C. O. S. 1921) did not impliedly require the giving of notice by the Secretary of State.

2. That under this interpretation the sections referred to were constitutional.

Our First Proposition is:

A STATUTE FOR SERVICE UPON FOREIGN CORPORATIONS BY SERVING THE SECRETARY OF STATE WHICH DOES NOT EXPRESSLY OR IMPLIEDLY REQUIRE THE SECRETARY OF STATE TO NOTIFY SUCH CORPORATION THAT IT HAS BEEN SUED IS VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT DEPRIVES, AND HAS DEPRIVED, THE PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Second:

THE CAUSE OF ACTION AROSE WITHOUT THE STATE OF OKLAHOMA; AND THE CONSTRUCTIVE SERVICE DOES NOT GIVE THE COURT JURISDICTION.

Of these in their order:

First Proposition.

A statute for service upon foreign corporations by serving the Secretary of State which does not expressly or impliedly require the Secretary of State to notify such corporation that it has been sued is violative of the Fourteenth Amendment to the Constitution of the United States, in that it deprives, and has deprived, the petitioner of property without due process of law.

This proposition may be stated in the form of a question, the answer to which will be determinative of this case:

Is a state authorized to adopt a statute for constructive service, which, by its own interpretation will prevent the defendant from receiving notice, rather than aid the defendant in obtaining information that a suit has been filed against it? The answer to this question, it seems to us, is contained in very terse language in the original opinion by the Supreme Court of Oklahoma:

> "To permit such judgment to stand would contravene the basic principles of American jurisprudence and shock the very soul of justice."

In fact, to ask the question is to answer it. The Fourteenth Amendment to the Constitution of the United Sates denies to any state the privilege to deprive the defendant here of its property without due process of law.

The judgment in this case, for more than $3,900.00, was rendered by default against the petitioner. It did not learn of the judgment for some months. We have cited in

the brief annexed to the petition for writ of *certiorari* the case of *Straub* v. *Lyman Inv. Co.* (S. D.), 46 L. A. R. (N. S.) 941, and *State* v. *Hooker*, 22 Okl. 712, 98 Pac. 964, in each of which the language dealing with the character of notice necessary to constitute due process of law is approximately as follows:

> "It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprized of what is going on against him, and an opportunity offered him to defend."

Mr. Justice PECKHAM, in the case of *Connecticut Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 603, 43 L. ed. 569, clearly indicated the necessity for some character of personal notice to the company in this language:

> "Taken in connection with the further fact of sending (as provided for in the statute), a copy of the process and notice thereof by registered letter to the home office of the company, and also the personal service upon the company of a copy of the process and notice thereof at its home office, it must be admitted that one of the chief objects of all such kinds of service, namely, notice and knowledge on the part of the company of the commencement of suit against it, is certainly provided for. We do not intimate that mere knowledge or notice as thus provided would be sufficient without a service on the agent in the state where suit was commenced, but we refer to it as a part of the facts in the case."

We refer the court to the following cases, federal and state, in each of which a statute similar to the Oklahoma

Statute has been declared unconstitutional for the reasons which we have here assigned:

King Tonopah Mining Co. v. *Lynch*, 232 Fed. 485;

Knapp v. *Bullock Tractor Co.*, 242 Fed. 543;

Southern Railway Co. v. *Simon*, 184 Fed. 959;

Cella Commission Co. v. *Bahlinger*, 147 Fed. 419 (78 C. C. A. 467);

Gouner v. *Mississippi Valley Bridge and Iron Works*, 49 Southern 657;

Pinney v. *Providence Loan & Trust Co.*, 106 Wis. 396, 82 N. W. 308;

Wildes v. *Mining Co.* (Nevada), 170 Pac. 1047.

The question has not been before decided by the Supreme Court of Oklahoma. In *Title Guaranty Co.* v. *Slinker*, 42 Okl. 811, 143 Pac. 41, the statute was said to be constitutional, but there is raised the question of discrimination, not of notice. In none of the cases which are cited in that opinion, to-wit:

Mutual Reserve Fund Co. v. *Phelps*, 190 U. S. 147;

Northwestern Life Ins. Co. v. *Riggs*, 203 U. S. 243;

Orient Ins. Co. v. *Daggs*, 172 U. S. 557,

is the question of notice involved. In fact, in the *Mutual Reserve Fund Company* case, the statute in controversy provided for the commissioner to send at once to the company, at its principal office, the notice served upon it.

SECOND PROPOSITION.

Substituted service statutes of the State of Oklahoma do not apply to causes of action arising, as in the present case, without the state.

—*Simon* v. *Southern R. Co.*, 236 U. S. 116, 59 L. ed 492.

The petition of the plaintiff is stated in five causes of action (Tr., pp. 2-9). The first cause of action was dismissed by the plaintiff, Scott (Tr., p. 15).

The second cause of action alleges that the plaintiff (a resident of Oklahoma City), ordered of the defendant (whose principal place of business is in the City of St. Joseph, Missouri), two certain shipments, which, being unsatisfactory, were returned, although shipped C.O.D. and paid for by the plaintiff. When returning these goods, the plaintiff also sent to the defendant other merchandise of the value of twenty dollars, prepaying charges thereon in the sum of three dollars.

Obviously the cause of action arose when the defendant company failed to remit to the plaintiff for the goods so returned. That is to say, it arose when the goods were received by the company in St. Joseph, Missouri, as alleged. Therefore, the cause of action arose in Missouri.

The third cause of action alleges an over-charge of $40.33, on certain goods shipped C.O.D. Perhaps this cause of action arose in Oklahoma. As a part of this cause of action, however, it is alleged that $20.50 worth of goods were returned to the defendant and that it had retained the

purchase price paid. This sum falls within the same category as the second cause of action.

The fourth cause of action sounds in tort. It is alleged that "defendant purposely and fraudulently shipped parts and repairs to plaintiff" * * * "which parts and repairs the defendant then and there well knew would not fit plaintiff's machine." It is apparent that this cause of action arose in Missouri, because the fraudulent purpose, intent and shipment were all accomplished at that point.

The fifth cause of action further alleges that "by reason of the wrongful and fraudulent acts of the defendant in purposely shipping the mismatched and non-fitting parts and repairs for said machine" he was damaged in the sum of $2,500.00. This is, of course, also an action in tort and the tort was committed in St. Joseph, Missouri, by the fraudulent shipping of the goods.

The question of liability for such tort, therefore, depends upon the laws of Missouri, and that is the place of the commission, and hence, the place where the cause of action arose.

—*Dennick* v. *Central R. R. Co.*, 103 U. S. 11, 26 L. ed. 439.

Not that the courts of Oklahoma might not enforce the action; but the courts of Oklahoma may not enforce it under their own constructive service statutes.

> "But the power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law.

Otherwise, claims on contracts, wherever made, and suits for tort, wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extraterritorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Mut. Life Asso.* v. *McDonough*, 204 U. S. 22, 51 L. ed. 351, 27 Sup. Ct. Rep. 236, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states."

—*Simon* v. *So. R. Co.*, *supra*.

Respectfully submitted,

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